

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
GRACIE BAKED LLC et al., : 22-cv-04019-RPK-VMS
:
Plaintiffs, :
:
- versus - : U.S. Courthouse
: Brooklyn, New York
GIFTROCKET, INC., :
: December 4, 2024
Defendant : 5:06 p.m.
-----X

TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE VERA M. SCANLON
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:
(VIA VIDEO/AUDIO)

For the Plaintiffs:

Raphael Janove, Esq.
Janove PLLC
500 7th Avenue, 8th Floor
New York, NY 10018

Liana Roza Vitale, Esq.
Janove PLLC
979 Osos Street, Suite A5
San Luis Obispo, CA 93401

For the Defendants:

Faris A. Rashid, Esq.
Gina Tonn, Esq.
Kshithij Shrinath, Esq.
Greene Espel PLLP
222 S. Ninth Street, Suite 2200
Minneapolis, MN 55402

(Appearances continue on next page)

Transcription Service:

Transcriptions Plus II, Inc.
61 Beatrice Avenue
West Islip, New York 11795
RL.Transcriptions2@gmail.com

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APPEARANCES CONTINUED

For the Defendants:

Katherine Burghardt Kramer, Esq.
Megan O'Neill, Esq.
Kevin Westerman, Esq.
DTO Law
305 Fifth Avenue, 12th Floor
New York, NY 10016

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1 THE COURT: All right. This case is *Gracie*
2 *Baked LLC v. GiftRocket* 22-cv-4019.

3 So let's start with plaintiff's counsel.

4 MR. JANOVE: Good evening. Raphael Janove and
5 Liana Vitale of Janove PLLC for plaintiffs.

6 THE COURT: All right. And how about
7 GiftRocket defendants?

8 MS. KRAMER: Good evening, your Honor. This is
9 Katherine Kramer of DTO Law, and I'm joined by my
10 colleagues Megan O' Neill and Kevin Westerman.

11 THE COURT: Okay. Just going down the docket
12 here. All right. How about for Sunrise?

13 MR. RASHID: Good evening, your Honor. This is
14 Faris Rashid from Greene Espel. I'm joined by my
15 colleagues Gina Tonn and Kshithij Shrinath.

16 THE COURT: Okay. All right. So we have a
17 stack of papers from you all. I have some questions.
18 The one I have the most questions about, which we'll get
19 to in a minute, the request for the text messages for
20 which plaintiffs are claiming that there was a waiver of
21 the attorney-client privilege and obviously the
22 defendants are taking a different view.

23 But let's start with something maybe a little
24 bit easier, although this is out of order. So there's
25 document 205 which was filed on November 1st, and this is

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1 a request for the running of additional search terms.
2 The plaintiff is moving for GiftRocket to do this and one
3 question I have which is flagged on the docket was what
4 is the burden to GiftRocket at this point. At least in
5 the letter on page 3 what plaintiff had said was
6 plaintiffs proposed that the above terms -- and I don't
7 even know how to pronounce these. Anyway, however you
8 would say it, the ones that are identified on the first
9 page of the letter, the above terms were run on custodial
10 documents dated between July 1, 2022 and June 3, 2024 to
11 minimize the chance that terms hit on other earlier
12 corporate reorganizations of the GiftRocket defendants to
13 substantially reduce any potential burden.

14 Later on in the letter there was also a
15 suggestion of a way to avoid getting privileged documents
16 by noting who the recipients were.

17 But anyway, for GiftRocket side, what do you
18 know about how big a search this is, how long it would
19 take et cetera, et cetera? What's the burden?

20 MR. WESTERMAN: Good evening, your Honor. This
21 is Kevin Westerman of DTO. I have an answer to your
22 question on just the size of the review universe and also
23 a proposed compromise that can hopefully take this motion
24 off the docket.

25 So the review universe if we were to limit it

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1 to July 2022 through June 2024, as the plaintiff
2 proposed, would bring it down to about 100,000 pages
3 which is still quite a bit to get through and would
4 impose an undue burden.

5 But in order to move things along, we would
6 propose the plaintiff's motion also mentions that they
7 are interested and want internal discussions between and
8 among GiftRocket employees --

9 THE COURT: Right.

10 MR. WESTERMAN: -- that discuss the
11 restructuring. So if we were to limit the review
12 universe to that time period and also limit it to
13 instances where it's internal communications, so just
14 people with GiftRocket or Tremendous domain addresses are
15 on the to and from line, we believe that that will bring
16 that 100,000 page universe down to about 50,00 or maybe
17 slightly less pages.

18 And so while we still believe any additional
19 further review would be disproportionate to the needs
20 here, we kind of get the sense of where the Court might
21 be going with this based on the order and wanted to
22 propose that at the outset.

23 THE COURT: Okay. From plaintiff's side, have
24 you considered the proposal?

25 MR. JANOVE: Just hearing the proposal for the

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1 first time, I think well, that works for us.

2 THE COURT: Okay. So to put some bracketing
3 timelines on it on the defendant's side, what do you
4 think it would take for you to run the search, do the
5 review, provide it over to the plaintiff?

6 MR. WESTERMAN: I would say 30 days would
7 typically be fine and then we're also running into the
8 holidays. So possibly ask for a couple of extra days.
9 I'm looking, pulling out my calendar now. I think June
10 6. Not June 6. January 6th would be manageable if that
11 works for the plaintiff.

12 THE COURT: I was just going to say it's okay
13 because I assume that everybody would be reluctant to
14 give consent until you know if you're going to get a
15 little more time which, you know, I won't hide the ball
16 (indiscernible) a little more time.

17 All right. So I'm going to take the 205 motion
18 as moot because you've come to a resolution as discussed
19 on the call today and the production by the defendants
20 will be made by January 26, 2025. All right. That's
21 that one. I'm just looking through my folders here.

22 All right. The one that I have the most
23 questions about or at least not sure where this should go
24 is 203 which is the motion related to the text messages
25 between Mr. (indiscernible) and Bentley and there's the

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1 assertion of privilege.

2 So look, couple of questions. I might have
3 more questions, but I'm going to tell you what they are.
4 I think, unless we get clarification here, I think I want
5 some additional submission but among, and not in any
6 particular order, my questions are first, it seems like
7 from at least the defendant's perspective, this exchange
8 was done with the advice of counsel that the privilege
9 was being maintained. So the question right out of the
10 box is is that a waiver such that -- I understand the
11 defendant's position is no, there was no -- you know, the
12 privilege is still in place.

13 But assume that the privilege did not exist but
14 counsel thought it did exist between the two, both the
15 counsel in this case, and the Giftly counsel thought it
16 did and the parties, according to the information here,
17 had their conversations with that understanding. Is that
18 a waiver to the extent that the privilege was there and
19 even if it wasn't, did they have any intention of waiving
20 it such that -- I mean I think under those circumstances
21 where they understood it was okay, this is almost like
22 the cases where someone accidentally emails something and
23 they don't mean to let it go. They did what they could
24 to protect it and when there's a problem they re-call it,
25 and that's not a waiver. So that's one question.

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1 I guess on the defendant's side I would like to
2 get to the more traditional approach to this. What
3 exactly do you think the comment interest is here
4 responding to the plaintiff's description of, you know,
5 what the interrelationship here is.

6 And then the third point, and this is more of
7 a -- I'm trying to think of the incentive and reasoning
8 behind the privilege. Honestly, what I find sort of
9 troubling/problematic here is plaintiff's claim is that
10 these communications between the two senior officers of
11 these two companies, the two CEOs, was not privileged
12 because they are not in the same lawsuit together.

13 But what seems difficult to reconcile is that
14 plaintiff had two of the same parties in the lawsuit at
15 the same time. Plaintiff had the same counsel.
16 Plaintiffs know about both the GiftRocket and the Giftly
17 case. And you know, presumably, there's nothing in the
18 record to suggest otherwise, the plaintiffs didn't split
19 themselves and say we're never going to think about the
20 other case.

21 So effectively, plaintiff created the situation
22 where plaintiff could easily share information about the
23 cases and in fact, you know, you put out a press release
24 talking about the fact that you were counsel in both
25 cases. Again, you have the same parties and it seems

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1 like it's a free-for-all, you could do whatever you want
2 with regard to the information that is being provided in
3 both of the cases.

4 Now, Giftly settled it seems like early early,
5 so this didn't go on for that long. But it was certainly
6 envisioned that, you know, you'd be wearing both hats and
7 the same parties would be getting information from both
8 sides. So it seems -- now I'm not exactly sure what
9 theory to apply but I'm not quite sure this is reasonable
10 or fair or the right understanding where there's free
11 flowing information on the plaintiff's side but not on
12 defendant's side when they are the other parties on the
13 other side, just you happened to file it as two separate
14 lawsuits. I don't know, conceivably this could have been
15 one lawsuit it seems from the description. And I don't
16 know that much about Giftly, but it seems from your
17 description that this is a kind of a mirror or copycat,
18 however you want to describe it, very, very similar and
19 enough that you could describe it in the press release as
20 being, you know, the defense is consumer interest in this
21 area.

22 So I'm troubled by the fact that plaintiffs
23 are, according to plaintiffs, you -- (indiscernible) not
24 talking about it but it seems like from what you're
25 saying you're freely able to exchange information because

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1 it's the same parties and the same lawyers. And yet
2 somehow the defendants, who are the defendants in their
3 respective lawsuits with you who joined together in your
4 press release are not supposed to be talking and, you
5 know, they're waiving their privilege. So I'm not sure
6 how that fits in the paradigm but it's troubling.

7 And then I'm going to get back around the -- if
8 you have this information now, great. But this is part
9 of what I'd like to see in some additional submissions is
10 accepting plaintiff's description of what was going on
11 here, many of the cases have some connection to a
12 particular transaction or set of transactions between the
13 parties that are claiming the common interest privilege,
14 the common defense. So taking the one case I was talking
15 about, the various alleged infringers, right, they were
16 all in the chain of distribution.

17 So I'm curious if you know about cases where
18 you don't have that contractual relationship between the
19 two parties that are claiming the joint privilege other
20 than obviously there was a historical contractual
21 relationship about having the same lawyers do some work
22 for both parties. But, you know, that seems a bit old.

23 Anyway, so this is sort of musings on this
24 issue. So let me hear from defendants. Any reaction?
25 Or you can think about it and give me a supplemental

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1 submission and I'll hear from plaintiff and the same
2 thing.

3 MS. O'NEILL: Thank you, your Honor. This is
4 Megan O'Neill on behalf of the GiftRocket defendants.

5 Well, I'd like to go to the second and the
6 third areas that you highlighted which is what is the
7 common interest because our view is that the analysis
8 does not need to go further than that under Second
9 Circuit law.

10 So here, the plaintiffs seem to be challenging,
11 and this seems to be the crux of the dispute, whether
12 there is a common interest or not. And from our
13 perspective, it couldn't be more obvious that there is a
14 common interest. Most of the cases have to do with a
15 non-litigation posture as your Honor referenced. And so
16 perhaps there were writings in those cases, but here the
17 law is pretty clear you don't need a writing that
18 actually formalizes the agreement.

19 I personally have been part of many common
20 interest agreements as a class action defense lawyer and
21 it's not uncommon to have copycat suits filed by the same
22 plaintiff's counsel against several different defendants.
23 And it's very important to be able to share strategies in
24 those cases and not have it be a waiver of privilege.
25 And the common interest doctrine has always been the one

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1 that all the defense counsel rely on in my experience.
2 So the common interest here being not just a similar suit
3 but nearly a copy and pasted lawsuit against two
4 different, you know, like a business model itself being
5 identical.

6 The plaintiffs have pointed to, you know, some
7 small differences in terms of the websites. But the
8 theory of liability, the claims, the plaintiffs, all of
9 it were the same.

10 So here the common interest was -- you know, I
11 don't know what more in a submission we could actually
12 give the Court without waiving the privilege and that was
13 plaintiffs had pointed to -- they've claimed that my
14 declaration was inadequate but I can't say more without
15 waiving privilege. I can't say what I talked to Davis
16 Wright and Tremain about other than to say that
17 everything was in furtherance of a common interest and
18 that we agreed there was a common interest and that the
19 privilege applied.

20 And so, you know, this is the tricky part about
21 privilege is there's not a lot you can say about why the
22 privilege applies other than the parameters and
23 boundaries which is what we're trying to do here.

24 But I don't really understand honestly why the
25 plaintiffs are seeking that. It just seems aside from

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1 just morbid curiosity what the CEO of each of the
2 defendants were saying to one another, how during the
3 litigation, not sort of ten years earlier, in terms of
4 that there was some allegation of conspiracy, which there
5 isn't, but actually what their comments were about how
6 they were going to defend the lawsuit, to me the
7 relevance of that, it's only relevant if they're talking
8 about the legal strategy which shows that if they're
9 talking about the legal strategy, they are engaged in a
10 common interest conversation. If they weren't, we
11 wouldn't be alleging privilege over it, and we did
12 produce lots of text messages that didn't have to do with
13 that. So we limited the scope so that we were very
14 circumspect. So if it's another conversation, the
15 plaintiffs would already have it.

16 And so I'm a little bit at a loss because to me
17 the common interest seems so clear. We are both, as your
18 Honor pointed out, like the same counsel is suing us in
19 the same -- with exactly the same words. And so what
20 responses we are going to do is coordinated in many
21 cases. Lawyers talk to each other. Just speaking
22 hypothetically, lawyers speak in the defense of class
23 actions all the time about what strategies to best use
24 and how we think the courts will perceive them and how
25 one judge's reaction could affect another judge's

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1 reaction. And all of that is done under the umbrella of
2 privilege under the common interest doctrine.

3 So I think that that's the -- from our
4 perspective, while all of these -- I do appreciate that
5 your Honor is raising a lot of important concerns and
6 fairness considerations, but from our perspective under
7 Second Circuit law, the common interest doctrine very
8 clearly protects these conversations.

9 THE COURT: Okay. So maybe what you just
10 repeated in your letter, and I am not seeing what it is
11 that you're saying is the common interest. Okay?
12 Because it's what you're saying very generally. Most
13 businesses have an interest in defeating the plaintiff's
14 consumer-related class actions. I mean that would be a
15 true statement and then get down more specifically to,
16 you know, financials, monetary transfer businesses, you
17 know, kind of including Tremendous and GiftRocket, right?

18 Yes, sure, it's generally the theme. But you
19 can't be talking all the time because if you're talking
20 all the time, you have an antitrust problem. It's just
21 not happening because you're competitors, right?
22 Supposedly like two of the bigger competitors in this
23 sphere. So sure, lawyers can talk generally. You could
24 go to, you know, in-house counsel conferences, you could
25 go to class action defense conferences and talk.

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1 But here what supposedly is happening, you
2 know, and obviously everyone has a suspicious mind until
3 they actually see the text, but the information being
4 exchanged between two parties not in the same lawsuit who
5 are competitors but they can be with each other but
6 they're also presumably unhappy about the fact that they
7 have been sued and want to both defeat plaintiff's claims
8 in and of themselves in this case and also I would assume
9 hopefully define in a helpful way the law as it affects
10 your business.

11 Yes, that's generally true but common interest
12 suggest something more specific. And the cases that
13 you're both citing are much tighter relationships between
14 the parties who are sharing the information. So again, I
15 think the one that's helpful is the one that was cited
16 with regard to infringement because it wasn't that the
17 parties were identical, you know, more akin to the joint
18 tort (indiscernible) or something like that. They were
19 in the chain. They may have had different activities in
20 which they engaged in with regard to the distribution of
21 the allegedly infringing material. But they still were
22 responding to the same or similar set of facts to the
23 same alleged violations that the plaintiff was describing
24 in the case.

25 And you know, I mean I hear that you're saying

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1 this like lawyers talk all the time in class actions but
2 like what's the case law that says that that's okay and
3 still privileged. I'm not saying it doesn't here. It's
4 not in these letters so I don't even know what is it
5 where this issue has percolated up such that the court
6 weighed in on it. Or I don't know, it's like analogous
7 because it is not -- you say it over and over in your
8 papers and now that there's a common interest but, you
9 know, the generalized common interest is not a common
10 interest that's sufficient to report a waiver.

11 And you know, as to you both being defendants,
12 you know, your clients being defendants against this
13 party, I would say that's not always, or these parties,
14 it's not always enough.

15 And my third kind of question or musing is
16 about well, you know, is it really fair the plaintiffs
17 have pursued, same plaintiff, same lawyers, same theory
18 against two of the larger competitors in the field and
19 then your folks can't talk? It may be that that's a
20 reason, you know, it's good for them, it's good for you
21 but I don't know.

22 So anyway, even if you have to painstakingly
23 express this to me, I am not clear what it is that you
24 think the common interest is here other than being able
25 to successfully defend this lawsuit.

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1 MS. O'NEILL: Okay, your Honor. Just so I -- I
2 want to make sure I respond to your question, I want to
3 make sure I understand it.

4 So is it your conclusion based on the case law
5 or otherwise that a joint legal strategy, formulation of
6 a coordinated legal strategy, two identical lawsuits
7 would not constitute a common interest privilege?
8 Because our reading of the case law is that very much
9 does and that it's not a generalized sort of we're both
10 like, you know, two companies and we're facing similar
11 issues.

12 And my reading of the case law is that those
13 are the cases where people tried to say hey, we just
14 though someday we might get sued and we were talking
15 about what might happen. We've actually both been sued
16 at that same time on the same day and we're having
17 conversations about what our lawyers are saying to do. I
18 don't see how that couldn't be a common interest because
19 we're sharing legal strategy about how to proceed in
20 identical lawsuits. If that isn't a common interest, I
21 truly don't know what is. It seems that the doctrine
22 doesn't even exist.

23 THE COURT: Okay. I mean this is not what the
24 cases that are cited in these letters are, or letter, is
25 about. There's many more examples of either being in the

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1 same lawsuit, being contractually connected by your
2 relationships, again going back to the infringers and the
3 chain of distribution, or there's some other corporate
4 relationship among the parties.

5 So I mean is there a particular case that you
6 think is helpful in the submission that describes the
7 common interest privilege in the way that you're
8 describing it?

9 MS. O'NEILL: Yes. So we're happy to submit
10 something additional specifically focusing on the
11 question that your Honor has. I think we may need to go
12 beyond the Second Circuit to all federal court precedent
13 because honestly this does not come up very often, this
14 doesn't get challenged very often. Most of the time
15 these sorts of post litigation conversations are
16 understood to be privileged. The parties don't -- I
17 don't usually have plaintiffs trying to get this
18 information knowing that it's about the litigation.
19 They're actually looking for information that's relevant
20 to the claims of the case. What you say about being sued
21 in litigation to me is not relevant at all in the first
22 place. But to the extent --

23 THE COURT: That's a different argument. I
24 mean you might be right --

25 MS. O'NEILL: Yeah. No, but I did --

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1 THE COURT: But it's different.

2 MS. O'NEILL: I mean I did raise that. And we
3 don't understand what the relevance of this is to begin
4 with other than to try to vitiate the privilege and get
5 access to my mental impressions and what I shared with my
6 client that he then shared which is the -- you know, to
7 me the only reason we're doing this is to make sure that
8 this sacrosanct privilege of work product, which is what
9 I share with my client, that then he, and what his
10 lawyers shared with him, and that that strategy does not
11 come out.

12 I don't see how the plaintiffs have any
13 entitlement to know that anyway, what my strategy was in
14 defending the case. I see no relevance. But to the
15 extent the Court does not agree with us on that, and I'm
16 just trying to prevent further briefing because I don't
17 think that there's any their there. But again, we have
18 to do this because we need to prevent, you know, any sort
19 of waiver of work product or attorney-client privilege.

20 So relative to that, we're happy to put in more
21 briefing. But I would say that just at a high level this
22 statement -- the reason that they're -- we didn't see
23 cases ever having someone assert this and having it not
24 be upheld.

25 So from that standpoint, I think it's on the

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1 plaintiffs to say when people were sued under identical
2 lawsuits and their attorneys talked and said that there
3 was in fact an agreement and the parties spoke, still no
4 privilege existed because those parties didn't have a
5 common interest.

6 So what they cited are cases that say just
7 saying I want to prevail in litigation isn't enough, but
8 those weren't cases where they were sued in identical
9 lawsuits at the same time by the same parties on the same
10 thing. So it's very different.

11 But we are happy to put in more things about
12 what constitutes a common interest because we think if
13 anything this does.

14 THE COURT: All right. What about the advice
15 of counsel question? Your client shared the information
16 with the belief, based on their communications with their
17 attorney, that they were sharing it confidentially. Even
18 if one were to say it was wrong given that they -- and
19 I'm not saying it is, I'm just trying to understand --
20 given that that was the understanding (indiscernible)
21 their attorney's insights, then did they waive the
22 privilege in those communications? It's hypothetically.
23 The confidentiality I guess.

24 MS. O'NEILL: Yeah.

25 THE COURT: It's a little circular but --

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1 MS. O'NEILL: Yeah, it's a tough one. Yeah.
2 It's a tough one to answer. I mean there's clearly no
3 knowing waiver of privilege and I think that's what your
4 Honor is getting at and the law certainly protects
5 innocent waiver, as you noted with clawbacks and that
6 sort of thing. So to the extent you can analogize that
7 certainly there should be no waiver that would prejudice
8 the holder of the privilege which is GiftRocket in this
9 case because there was no knowing waiver. Yeah.

10 THE COURT: And what about the idea that there
11 should be some balance here given that plaintiff, one
12 could argue the plaintiff structured this case in a way
13 to set it up so that they enjoy the benefits of being
14 able to share information but separated you two into two
15 different lawsuits even though they appear to be -- I
16 don't know if it's a copycat lawsuit when it's done by
17 the same person, you know, the same entity, but a mirror
18 lawsuit. Does that affect the analysis here?

19 MS. O'NEILL: Yeah. Well, I certainly think
20 your Honor has broad discretion to deny a motion seeking
21 to obtain privileged material or, you know, I should say
22 material over which privilege has been asserted. Your
23 Honor has many grounds on which you can deny such a
24 motion, one which is that in the scenario you're not
25 going to consider the privilege, you're considering

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1 something else which is under a proportionality analysis,
2 under relevance, under the equities, all of the above
3 that in this scenario the plaintiff is seeking to gain
4 access to comments regarding litigation strategy and
5 that's not information that's discoverable.

6 THE COURT: All right. And just to circle back
7 to the point that you wanted to make that you think it's
8 not relevant, you want to just expand on that? Yes, I
9 think our all understanding is hard without making
10 particular reference to certain texts, but still like --
11 I mean anything about the timing of this or how it
12 happened or limited number of parties to the
13 communications that, you know, I should take into
14 account?

15 MS. O'NEILL: Sure. So as I mentioned, we were
16 very -- we did produce many pages of text messages
17 between these two people at these tech startups. These
18 are not major corporations, just to reiterate that. So
19 at this company, we produced many pages of text messages
20 between the two and we only redacted a few of them
21 because they specifically referenced something covered by
22 the common interest doctrine meaning comments that
23 pertain to litigation strategies or thoughts shared by
24 their lawyers.

25 And there's no relevance to the claims in the

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1 case. What the case is about is how the plaintiffs were
2 purportedly injured by the business model or the website
3 for various things related to that comment that an
4 attorney who is representing the party would make about
5 how to defeat the lawsuit is not relevant to the claims
6 in the case.

7 THE COURT: All right. For plaintiff's side,
8 your thoughts?

9 MR. JANOVE: So your Honor, I think you brought
10 up some interesting questions that would benefit from
11 some supplemental briefing. So I would propose that we
12 could address this with some supplemental briefing.

13 It might also be held by some of the recent
14 deposition testimony and documents that we've discussed
15 with deponents regarding the relationship with Giftly and
16 GiftRocket that not only would touch on the existence or
17 lack thereof of a common interest privilege but touch on
18 to why these communications are relevant for this case.

19 So it's a long way of me saying I think
20 supplemental briefing is appropriate here.

21 THE COURT: Do you think it should be
22 sequential or at the same time?

23 MR. JANOVE: I think it might make sense that
24 we have a joint submission that addresses the three
25 questions you posed today.

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1 MS. O'NEILL: Your Honor, our preference would
2 be sequential just to make it a little bit simpler in
3 terms of the modifications. We tend to have a lot of
4 back and forth each time someone replies to the other.
5 Actually, sequential briefing would be our strong
6 preference.

7 THE COURT: All right. We can do it at the
8 same time, not a joint letter, two separate letters. If
9 I need a response to what the other side said, we'll let
10 you know. But for now I just want to hear your thoughts
11 about issues that we raised on the plaintiff's side. You
12 know, I don't really want to know about all of the facts
13 that you think are super important, but goes to this
14 relevance point because I think the key issue here is a
15 two-part question. Is it privileged? (Indiscernible)
16 privileged and is there any waiver? Or if there was a
17 waiver, you know, was it not knowing and so it shouldn't
18 be -- at least to the confidentiality, it's not just
19 privileged given the possible scenarios. There were
20 essentially given incorrect advice. Maybe that is what
21 happened and maybe it isn't. But you know, that's the
22 one scenario that one could see here.

23 All right. So today is the 4th but obviously
24 late in the day here in New York. So what are you --
25 what would you like to do in terms of submitting a

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1 supplemental letter, each of you?

2 MR. JANOVE: Would Friday the 13th work
3 (inaudible)?

4 THE COURT: Good luck or bad luck? Does that
5 work for the --

6 MS. O'NEILL: I was going to suggest Tuesday of
7 next week.

8 THE COURT: It's really on the plaintiff's
9 side. So you're talking about the 10th and plaintiff,
10 you want the 13th?

11 MR. JANOVE: Correct.

12 THE COURT: All right. Let's do the 13th.

13 MS. O'NEILL: Your Honor, if we're going to do
14 the 13th, can we do the 17th? Our entire team is flying
15 to Los Angeles for training and they'll be out of pocket
16 Wednesday through Friday of next week, so --

17 THE COURT: Yes.

18 MS. O'NEILL: -- we won't be able to do any
19 work. That would be great. Thank you.

20 THE COURT: All right.

21 MS. O'NEILL: I think that's a Tuesday, or
22 whatever the Tuesday is.

23 THE COURT: Tuesday is the 17th.

24 MS. O'NEILL: Perfect. Thank you so much.

25 THE COURT: Okay. I'm doing this the old

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1 fashioned way, I'm looking at the paper.

2 Oh, okay. So from your status letter, I have a
3 couple of follow-up questions.

4 MS. O'NEILL: Your Honor, I'm sorry, I forgot
5 to ask what would the page limit be for that because I
6 think that would be helpful to know.

7 THE COURT: What do you all think you need? I
8 mean I'd like you to be focused on the case law.

9 MS. O'NEILL: Short and sweet. Short and
10 sweet. Three or four pages max?

11 THE COURT: Yes, I think that would work. So
12 let's do -- you're going to do four pages. Okay. All
13 right. So that's for the 17th.

14 All right. Looking at your letter of the 2nd
15 which is on the docket at 215, so you have this dispute
16 about the Florida subpoena. Do you have any update on
17 what's going on? This is for the South State Bank in the
18 Middle District of Florida.

19 MS. KRAMER: So your Honor, this is attorney
20 Katherine Kramer from DTO for the GiftRocket defendants.

21 The case is still pending. The plaintiff filed
22 a motion to transfer. We filed a motion to quash. I
23 expect that South State Bank is also going to file a
24 motion to quash in opposition to the motion to transfer
25 and then it's just pending with the judge in Florida.

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1 THE COURT: Okay. All right. And then there's
2 this back and forth about the Philadelphia Pennsylvania
3 deposition. So with regard to the non-party witnesses,
4 do they have some association with the business? Did
5 they want to do the deposition by Zoom? Or what is it
6 that they're looking for?

7 MR. JANOVE: Your Honor, we had -- the
8 depositions were noticed for all three witnesses on the
9 same day so we were coordinating all three witnesses just
10 to do it at a convenient location for them which was the
11 same location as the WeCare 30(b)(6). So we were
12 scheduling those all three for the same day. We wanted
13 to do it at that same location. If they want to split it
14 up just to let us move on from this, we can have those
15 two witnesses, you know, appear remotely, the non-
16 witnesses, and then on a separate date Danny Buchnik can
17 come to Philadelphia just to help us move on from it.

18 I've been trying to coordinate it as it was
19 noticed for all three people on the same day. That made
20 it a little more complicated.

21 THE COURT: (Inaudible) --

22 MS. O'NEILL: Your Honor, this is --

23 THE COURT: Hang on one minute.

24 MS. O'NEILL: Sorry, your Honor.

25 THE COURT: I get the fact that the lawyers

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1 have certain preferences. What is it that the non-party
2 witnesses want to the extent that you know?

3 MR. JANOVE: The non-party witnesses want to be
4 deposed at a convenient location, right next door to Cafe
5 Ole or via Zoom.

6 THE COURT: All right. Defendant's counsel?

7 MS. O'NEILL: Thank you, your Honor. So we had
8 proposed doing them all in one day to minimize a burden
9 on the witnesses rather than -- we've had several -- most
10 of our witnesses, four at this point, have been
11 no-parties and they've all gone seven full hours on the
12 record. We were looking to minimize and just do a couple
13 of hours. But we do want to take them in person. And
14 there are various reasons that one of those people we
15 would like to do in person. But those two have been
16 subpoenaed in the Eastern District of Pennsylvania that
17 we were planning on, you know, moving in that district
18 for compliance since the plaintiff has stated they won't
19 appear for the depositions.

20 You know, we did propose remote depositions for
21 all witnesses after the plaintiff raised this issue and
22 the plaintiff said no just for these and not for two
23 other witnesses that they could choose, you know, remote
24 or in person which is how it typically works and we were
25 fine with that. But it can't be a different set of rules

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1 for defense witnesses and a different set of rules for
2 plaintiff's witnesses which is the concern here because
3 that does seem to be the position that plaintiffs are
4 taking.

5 So yeah, so while this -- it's a bit misleading
6 to say the location as the WeCare deposition. I was not
7 able to travel to take that deposition in person so we
8 took it remotely so the plaintiff was in his own office
9 for that. That was not the location of the deposition.
10 I took it virtually.

11 So you know, the plaintiffs, we actually had
12 moved the location from the Eastern District of New York
13 down to Philadelphia to be within the geographic area
14 where all of the witnesses reside and said look, we'll
15 just take it for a couple of hours.

16 If we do end up having to split them up this
17 way, you know, they probably won't be all on the same
18 day. That was all part of our proposed compromise.

19 But again, our paramount concern is that one of
20 those witnesses, for reasons that I prefer not to get
21 into because I think we should just be able to rely on
22 the Federal Rules of Civil Procedure and also we're happy
23 to bring this before the Eastern District of
24 Pennsylvania, but there is a particular non-party witness
25 that we have concerns about being in the location that

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1 the plaintiffs are insisting the deposition be taken for
2 various reasons. So that's why we'd like to take it on
3 mutual turf and that's why I said, you know, a law office
4 that is not far at all from where the plaintiffs reside.
5 Sorry, the plaintiff. The only one that's before your
6 Honor. Sorry, the plaintiff. I want to be clear.
7 There's affiliated witnesses and then there's the actual,
8 one of the actual plaintiffs.

9 THE COURT: Okay. So Danny Buchnik is the
10 party witness?

11 MS. O'NEILL: Yes. And that's the one that's
12 before you, your Honor.

13 THE COURT: Okay. The problem --

14 MS. O'NEILL: Or will be before you.

15 THE COURT: The problem with all this dancing
16 around is, you know, you want to do this in Philadelphia,
17 which is fine, although maybe the judge will kick it
18 here. You run the risk of running out of time for all
19 the procedural maneuvering with your hoped-for witness.
20 So it might make sense for you all to come to an
21 agreement about it.

22 Okay. So focusing on Danny Buchnik who you're
23 supposed to do this on Friday? Is that right? This is
24 December 6th?

25 MS. O'NEILL: It is set for December 6th, yes.

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1 THE COURT: And on plaintiff's side, what do
2 you want to do with him?

3 MR. JANOVE: So first --

4 THE COURT: I mean we're getting into all of
5 this, you know, extended motion practice in Pennsylvania,
6 then his deposition is just going to go forward. So
7 where do you want to do his deposition?

8 MR. JANOVE: So my proposal was just so we can
9 move on they can take Danny in person as a party witness
10 and the other two witnesses remotely for their
11 convenience. But we -- so we can do Mr. Buchnik in
12 Philadelphia if that's what the defendants prefer. It
13 just can't be the same day as the non-party witnesses.

14 But I did speak to Mr. Buchnik. He has had
15 something that came up with work. December 6th doesn't
16 work. But he can come to Philadelphia on December 10th
17 in the afternoon at 3 p.m.

18 THE COURT: All right. It's a set of dominoes
19 here. All right. Now you want to do him on the 10th and
20 you're agreeing to do it in person with the noticed
21 location. Was the purpose of him being an afternoon
22 witness was because you were going to be doing multiple
23 depositions? So going back to defendant's counsel, I
24 guess can you do the 10th? Do you still envision him as
25 being an afternoon witness? What's the situation?

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1 MS. O'NEILL: No, unfortunately for the reasons
2 I mentioned earlier, we're --

3 THE COURT: Training?

4 MS. O'NEILL: Our lawyers, yeah. They're
5 flying to the west coast on the 10th. So that's why we
6 had all of these depositions going through the 9th
7 instead. Perhaps the ninth would work, but the 10th
8 won't.

9 THE COURT: All right. Do you know what his
10 story is?

11 MR. JANOVE: I can see if the 9th works but --
12 I'll check with him if the 9th works. But I mean I was
13 hoping that I could offer the 3 p.m. in Philadelphia, you
14 know, meet me halfway and just do the non-party witnesses
15 remotely on a different date.

16 MS. O'NEILL: We can do the 9th and the second
17 part, we can do the 9th and we would start in the morning
18 because we're not going to stack all three in the same
19 day then and we can just have a normal deposition time.

20 MR. JANOVE: All right. Well, not sure if he's
21 available in the morning.

22 THE COURT: All right. Why don't you check
23 with him? All right. What we're leaving off here is
24 with regards to this witness, the first choice for your
25 mutual availability is sometime again in the hierarchy of

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1 the morning better than the afternoon on the 9th. And if
2 he's not available that day, then get other dates for the
3 week of the 16th. I guess for the rest of the month.
4 And then you all should coordinate when you can do it.
5 And travel is not -- I get the training. You know,
6 people are going to be doing other things. But their
7 availability to travel is not enough of a reason not to
8 go ahead with the deposition. Somebody will have to do
9 it. I hope you can come to an agreement as to doing
10 this. You know again, Zoom being -- you know, if there's
11 not a date for doing it in person then do it remotely.
12 But any which way, you need to do it by the end of the
13 year.

14 MS. O'NEILL: Thank you, your Honor. We do
15 have --

16 THE COURT: All right. And that --

17 MS. O'NEILL: Your Honor, we do --

18 THE COURT: Go ahead.

19 MS. O'NEILL: I was just going to say we do
20 have lots of other days that we could do. I mean we
21 picked the 6th because that's the day they gave us. And
22 I would just reiterate that if our witnesses, meaning the
23 defense witnesses, must appear in person, I would ask the
24 Court to make clear that it cannot be the case that
25 plaintiffs insist on remote depositions but refuse to

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1 take them of our witnesses.

2 THE COURT: All right. I'm not --

3 MS. O'NEILL: It's just out of the spirit of
4 fairness. It's just not fair, your Honor.

5 THE COURT: It's not, it's not. That's not how
6 this is going to work. You know, the parties and the
7 non-parties are different. There are different
8 considerations for different witnesses. And you know,
9 you basically have about two months to wrap up this case.
10 So whatever it takes to move it forward is what you need
11 to do. This is why I was --

12 MS. O'NEILL: No. Thank you.

13 THE COURT: I'm not going to address the non-
14 party witnesses. It would --

15 MS. O'NEILL: Oh, I'm not asking you to, your
16 Honor. I'm sorry if that's what you thought I was
17 saying. What I was saying is that plaintiff's counsel
18 just said if we had --

19 THE COURT: I got it, I got it.

20 MS. O'NEILL: This is a plaintiff's witness.
21 This is a party witness. That's all we're talking about,
22 your Honor.

23 THE COURT: I heard you. I'm telling you I'm
24 not adopting the blanket rule that you're saying. And
25 I'm also telling you all that you really need to work out

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1 the dates for these witnesses. And if you get into
2 motion practice over this in Pennsylvania, then maybe
3 it'll move quickly. Obviously Florida is taking a while.
4 And it's not going to be a reason to extend the discovery
5 schedule. So you know, work it out.

6 One thing I do want to raise, there is a
7 footnote going to, what is it, the sale of the cafe? Do
8 I have this right? And the suggestion that there's a
9 conflict between the parties, a live issue, what's the
10 situation? It's footnote 1. That's a letter --

11 MS. O'NEILL: Yes.

12 THE COURT: -- at 215, so it's on page 3.

13 MS. O'NEILL: Yes, your Honor, that's our
14 footnote for GiftRocket. Yeah, so this will lead to the
15 issue regarding Anna, the non-party witness. But this is
16 a person who purchased the -- WeCare is one of the
17 plaintiffs. They own Cafe Ole. They're one of the
18 parties that's got claims here against GiftRocket. Cafe
19 Ole was purchased by Anna during -- very recently, a few
20 months ago.

21 And there is a dispute about whether the sale
22 agreement would have included the claims present in this
23 litigation. And we're not really sure what to do because
24 it's a fairly novel issue to have a conflict related to a
25 third party so but just feel very uncomfortable taking

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1 the deposition of someone about the transaction where
2 they're being defended by the lawyer who represents the
3 person on the other side when the transaction is actually
4 what's at issue and what's covered.

5 So raising that for the Court but not really
6 sure what to do about it because we raised it with
7 plaintiff's counsel. We don't think it's a potential
8 conflict. We think it's a very clear conflict of
9 interest but we're not really sure what to do about it.
10 That's why it's in the footnote.

11 THE COURT: Let's start with what the parties,
12 or the party, non-party thinks about this. I mean is
13 there any view that the plaintiff's counsel is aware of
14 that (indiscernible) documents is -- or the parties are
15 unclear, the parties to the sale transaction are unclear
16 as to what they bought and sold?

17 MR. JANOVE: No, your Honor. As
18 (indiscernible) testified as a 30(b)(1) and 30(b)(6)
19 witness, he did not sell his claims in this lawsuit to
20 Anna. Anna did not purchase the claims in this lawsuit.
21 As you know, I think becoming a named plaintiff in any
22 sort of class action is not something that people take
23 lightly. Also, she's just a barrister at the cafe who
24 saved some money with her sister to buy it. She wasn't
25 getting involved in litigation. So there is no conflict.

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1 She can just testify to the same if we agree on the
2 location for that testimony to occur. May I also note
3 that --

4 THE COURT: Just to back up to what you see the
5 lawsuit as being for you. Is there an end period for the
6 class at this point or no?

7 MR. JANOVE: Well, so there's certainly a body
8 of case law that's developed about what happens when a
9 class representative individual claim for injunctive
10 relief becomes moot and whether --

11 THE COURT: Right.

12 MR. JANOVE: -- they still have standing to
13 seek classwide injunctive relief. The law has become
14 generally clear that the standing to seek classwide
15 relief, injunctive relief, is measured to the time of
16 filing the complaint.

17 So maybe that WeCare, since it sold its cafe,
18 no longer has an individual claim for injunctive relief,
19 it still has standing to bring a claim for injunctive
20 relief on behalf of the class.

21 THE COURT: All right. I'm not going to try to
22 resolve this one now but I guess like the other side of
23 that question, okay, it doesn't have -- assume for the
24 sake of this discussion that plaintiff's claims were
25 going to be successful. From the date of sale forward,

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1 wouldn't the cafe, as owned by the purchaser, be the
2 beneficiary of whatever relief there would be for the
3 period of time of the ownership? So in your, you know,
4 in your wildest dreams, right, I know you're like fine
5 tuning this, but you know, you think there would be some
6 damages that could flow from this and then there could be
7 injunctive -- this meaning the lawsuit -- and then there
8 could be injunctive relief and that would be split I
9 suppose between the different periods of ownership,
10 right?

11 So while they didn't, I think what you're
12 saying, they didn't sell the claims up through the date
13 of sale, they also didn't retain them as they might, I
14 mean I'm not agreeing with any of this, but as they
15 might be still accruing from the date of sale, you know,
16 to the present and into the future depending on how long
17 this all takes. Right?

18 I mean there's no retaining some interest. I
19 read the sale. I mean they didn't retain any interest in
20 future damages or future claims, right?

21 MR. JANOVE: Do you mean WeCare having
22 additional claims that might accrue post April 20 --

23 THE COURT: Yes. '24, yes.

24 MR. JANOVE: Yeah, 2024. Yeah. No. And
25 WeCare had been de-listed from GiftRocket's website

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1 shortly after this lawsuit was filed.

2 THE COURT: Okay. So you think there may not
3 actually be any problem, any ongoing problem. Okay.

4 All right. Look, in terms of this deposition,
5 the fact that the defendants envision that there's a
6 conflict with the plaintiff and the other parties don't
7 believe there's a conflict and they have a mutual
8 understanding of the significance of their agreement,
9 then there is not a conflict at this point. If it
10 becomes a life issue that the interpretation of the
11 agreement should be different from what the parties
12 think, then maybe there would be a problem. But I don't
13 see this as an issue to slow down the work or compromise
14 the representation of either of these folks. Okay.

15 MS. O'NEILL: Your Honor? Your Honor, if I can
16 just take 20 seconds on that which is we're not
17 questioning in any way what the plaintiff's
18 interpretation of the agreement was or what Anna, the new
19 purchaser. Our only point is that if there's a sale
20 agreement and the question for the lawyer is does this
21 entitle me to recovery in a lawsuit, the person who has
22 to answer that is your lawyer who's interpreting the
23 legal impact of that contract. And if the lawyer
24 represents both sides, then they cannot give advice that
25 would not be subject to a conflict of interest because if

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1 they said here, you get a claim under it or you don't get
2 a claim under it because as you said you saw the bill and
3 it says all assets tangible and intangible including
4 goodwill which the plaintiff in the complaint say they're
5 seeking.

6 So for all of those -- those are the reasons we
7 raise it. I just wanted to make clear we felt like we
8 had to raise it and as officers of the court, it's
9 uncomfortable to take a deposition of someone under those
10 circumstances. But we don't need to discuss it further
11 but we just wanted that on the record.

12 THE COURT: All right. But to take the
13 plaintiff's point, obviously your client is taking the
14 position there are no valid claims here but given the de-
15 listing, is there any possibility that there are accruing
16 claims for the cafe?

17 MS. O'NEILL: The fact -- I agree that the cafe
18 has never had standing from the very beginning because as
19 the plaintiff, WeCare testified they don't believe anyone
20 ever saw them, there's no basis to think saw them on the
21 website. So agreed as to all of that. There were no
22 damages at any point in time. But the plaintiff is in
23 fact seeking damages.

24 So what if in the hypothetical world that there
25 was a settlement, for example, related to Cafe Ole's

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1 supposed damage? Who would those funds go to? Would it
2 be the prior owner or the person who purchased all the
3 assets in Cafe Ole? I certainly know what my legal
4 opinion would be. So that's where this came up.

5 THE COURT: Okay. Let's just circle back to
6 the question that I asked plaintiff's counsel which is to
7 his knowledge, and having listened to the issue with the
8 two of them, do they have any disagreements as to their
9 understanding of the sale of the assets and what that
10 entails? That would encompass any benefit from a lawsuit
11 which based on the facts here seems to be time bound
12 anyway, but this is an issue in many a case but according
13 to plaintiff's counsel is representing that these two
14 parties do not have a disagreement. They do not have a
15 live conflict. If something changes in their view, then
16 maybe they would but they don't have it now.

17 All right. Let's talk about the schedule. We
18 have the letter from Sunrise who I guess is the most
19 sympathetic in terms of the timeline here related to this
20 excitement.

21 I think it seems to me there's more work to be
22 done than necessarily what's described in this letter but
23 given the work that you have to do, so we just added the
24 briefing. You have the agreed upon production of the
25 results of the search and some other dates from earlier

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1 today. You have identifying a 30(b)(6) deponent for
2 deposition. This will happen in January. That's by the
3 23rd of December.

4 Producing documents about plaintiff's financial
5 and business structure, that's the same date.

6 Producing documents about Tremendous from
7 defendant, that's also by the 23rd.

8 And then letting me know that you have firmed
9 up your 30(b)(6) depositions by January 3rd.

10 And then the damages supplement is I think --
11 really it should require some significant thinking on the
12 plaintiff's part. That's also by January 3rd.

13 So you know, the Florida matter up in the air.
14 If you turn the Pennsylvania issue into something, that's
15 also up in the air. And to the extent you're doing any
16 other depositions which I'll ask you about in a second, I
17 think you have an awful lot of work to do in the next
18 part of the year.

19 So taking into account the Sunrise concern plus
20 the work that you all need to be doing, I think extending
21 this to mid-February is the outside of reasonableness
22 given the age of the case. So I'm going to say all of
23 this discovery needs to wrap up by Valentines Day.

24 Okay. Do you anticipate any other disputes
25 about depositions? I mean have you been -- outside of

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1 the 30(b)(6), the fact witnesses.

2 MR. JANOVE: Speaking for plaintiffs, we don't
3 anticipate -- we have 30(b)(6)'s for the GiftRocket
4 defendants, a 30(b)(6) for Sunrise, and a couple of other
5 fact witnesses that should all be done in January.

6 THE COURT: All right. How about for --

7 MR. RASHID: Your Honor, this is --

8 THE COURT: Sorry. Go ahead.

9 MR. RASHID: I apologize. I didn't mean to
10 speak over you. This is Faris Rashid for Sunrise, and we
11 also do not anticipate any disputes related to
12 depositions.

13 THE COURT: Defendant?

14 MS. KRAMER: Your Honor, this is Katherine
15 Kramer of DTO for the GiftRocket defendants. I had a
16 question about the Court's order on the 30(b)(6) topic
17 and we appreciate it, it seemed like the Court took a
18 very close look at everything. I wanted clarification of
19 whether the limitation applies to all three of the
20 corporate defendants or if the Court had in mind some
21 distinctions between the GiftRocket LLC and then, for
22 example, the Tremendous Parent, which is really just a
23 holding company that's been in existence for a year and a
24 half. If the limitations of topic were intended to be
25 consistent across the board between those three or if the

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1 Court was thinking perhaps we would just have fewer than
2 three 30(b)(6) depositions?

3 THE COURT: I think I'm immediately going to
4 put that back to you. I mean I have no idea what it's
5 going to take in terms of the number of witnesses or who
6 the witnesses are. Right? I mean if you talk about
7 broad categories, you have the technology folks, the
8 finance people, the strategy people, the history of these
9 transactions, and maybe -- you know, I don't know where
10 the restructuring falls in all that.

11 So I don't know if I'm answering your question.
12 What I don't know is for all three companies, you know,
13 taking your point that the parent is now the relatively
14 recent, in this current structure is relatively recent
15 invention, and at least from the descriptions you
16 provided, that's not where the tech people are housed,
17 right? The ones who are figuring out how to use
18 (indiscernible). Whether it's still happening or not,
19 that's a different question. But for example, there's an
20 AI question, there's a Yelp question, there was a web
21 design question. I don't know if it's the same person
22 for these different entities or not.

23 So there's no one who knows. The information,
24 is the information the same across the entities? I don't
25 know that all of the questions are relevant to all the

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1 entities given what you have described in your various
2 papers of what it is that they do.

3 Maybe for me to understand your question you
4 can give me an example of what you're concerned about in
5 terms of across the entities.

6 MS. KRAMER: Sure. I think the concern is the
7 plaintiffs served three identical sets of topics on three
8 different entities and it doesn't really make sense to me
9 that all three entities would then provide witnesses to
10 testify on the same things. But it may be that, you
11 know, we can look everything over and we have a meet and
12 confer that's now been scheduled with the plaintiffs for
13 next week. So maybe we can take the order, the Court's
14 guidance into account and talk this over with the
15 plaintiffs.

16 We've also now finished the fact witness
17 depositions for essentially everybody at the company that
18 has knowledge. So there's been a good opportunity for
19 the plaintiffs to learn the facts. So we'll I think
20 perhaps just have some conversations with them. If the
21 Court doesn't have further guidance on this issue, it may
22 be that we just need to talk amongst the parties and
23 figure out a reasonable approach that doesn't overburden
24 the witnesses and you know, what we're trying to avoid is
25 just duplicative preparation and discovery because that

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1 seems --

2 THE COURT: Okay. So maybe --

3 MS. KRAMER: That doesn't make sense to me.

4 THE COURT: Let me tell you as far as I went,
5 and if this means that, you know, even if you don't work
6 it out you have another question -- what I looked at were
7 the demands that were made and thought about it in
8 connection with the overall lawsuit and whether it was a
9 reasonable balance of what the issues are that are
10 important and central to the case. And then there are
11 others that are more peripheral, may be relevant, but
12 also seemed burdensome. And so, you know, they were
13 peripheral and burdensome. You know, they fell on the
14 no, you don't have to do this. But the objections were
15 pretty much blanket objections to various facets of these
16 questions.

17 And so what I did not try to parse, and if it
18 turns out that this is relevant, is -- I'm going to say
19 two things. I did not try to parse if the place where a
20 particular topic is most appropriately or even relevantly
21 addressed and it's not addressed in another entity, it
22 wasn't addressing that the other entity should come up
23 with a witness.

24 So let me just give you an example. I'll go
25 back to what I was trying to use as a description or give

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1 a description of. But take the web design. That would
2 seem like something for this case that is primarily
3 something relevant to GiftRocket. Maybe Tremendous, the
4 parent company, the holding company, has some information
5 about that but not necessarily. And Tremendous is doing
6 the monetary transfers, you know, the sort of separated
7 entity. You know, that seems like it's a really
8 different set of questions how they are doing their
9 website and is it relevant.

10 Now, maybe you're using the same tech company,
11 tech people, tech supervisors and somebody could be
12 providing information across the cases, you know, how the
13 tech department is run. Maybe because these companies
14 started together, maybe there is a legacy computer system
15 that is relevant to understanding how, just by way of
16 example, you know, the Yelp, culling of the Yelp
17 information was happening. But I'm not trying to create
18 a false basis for exploring information that is not
19 relevant, is not housed in the particular company and
20 really is not relevant to this.

21 And the reason I say all of that is because it
22 is possible, right, in the 30(b)(6) land to have somebody
23 be the representative of the company, learn the
24 information, and then testify and that would satisfy the
25 30(b)(6), you know, requirement. If you decide that's

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1 how you want to proceed, that's one thing, but I am not
2 suggesting that that be imposed so you have three
3 duplicate depositions that really the information is only
4 relevant to one company (indiscernible) and one company
5 and there's a witness that is the person who really knows
6 what that is.

7 So I think, you know, the motion practice
8 didn't try to parse out the different companies, but if
9 that's something that you all can't come to an agreement
10 about, then you should raise that. Not trying to create
11 essentially made up witnesses here. It just wasn't part
12 of what you -- this is basically a bifurcation. Yes,
13 relevant and not so burdensome that it shouldn't be
14 produced or not relevant or too burdensome, doesn't need
15 to be produced.

16 So you know, that's as far as this went. If
17 there's another level of analysis that you think would be
18 appropriate and needs to be factored in, then I think,
19 you know, to the extent you can't come to an agreement
20 about the witnesses you should raise that hopefully
21 quickly which is part of the point of having the
22 witnesses identified and the schedule set. And you know
23 who's being produced for what reason and for what
24 understanding.

25 And you know, I will just pick up on one thing

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1 you said which was referenced by way of a case that Judge
2 Pollak had. Since there's already been deposition
3 testimony that can be adopted by mutual agreement and
4 obviates the need for a particular examination, that
5 could help you really move through this. You have had
6 high level people already deposed so you may have the
7 best information that's available.

8 So the short answer to your question is I
9 didn't think that through and didn't see it in the
10 papers. If I missed it, you can raise it. If you missed
11 it or at least didn't anticipate it and you want to raise
12 it, that's fine. This is definitely not an exercise in
13 creating more work.

14 MS. KRAMER: Understood, your Honor.

15 THE COURT: Any thoughts?

16 MS. KRAMER: No, I appreciate that very much
17 and I think that the Court certainly took on analyzing
18 these issues beyond what the parties had asked for at
19 this point in time but I think what we were anticipating.
20 So it's very helpful to have that guidance.

21 It sounds to me like what your Honor had in
22 mind was that you were trying to narrow it down to
23 relevant topics with the idea that then the parties would
24 try to divvy those topics up among the most relevant
25 entities. So it's not that those topics would then be

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1 topics for each of the three entities but essentially
2 what your Honor is trying to do is narrow it down and say
3 hey, these are the relevant issues, now go take these and
4 figure out should it be GiftRocket, should it be
5 Tremendous, should it be Tremendous Parent. Is that what
6 your Honor had in mind?

7 THE COURT: Yes, except to the extent that
8 information that's housed, for example, in GiftRocket,
9 you know, might be, you know, you need to work out
10 whether that was binding for Tremendous, something like
11 that. But yes, I want you to do it efficiently. And
12 again, that's the point of trying to get the schedule set
13 up and clarified sooner rather than later.

14 You know, I think you all generally agree on
15 what's relevant except for the big picture, not big
16 picture, but big points that whether the restructuring
17 was meant to divert assets or hide out or something. And
18 you know, plaintiffs are suggesting they should be
19 allowed to explore it. I gave you some leeway in terms
20 of the documents, you know, but not in terms of
21 depositions. You know, if the lay of the land changes
22 and that analysis should change, you could raise that
23 issue. But otherwise I think, you know, you're all
24 exploring the same topics really, at least in terms of
25 whether there is or isn't liability here.

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1 All right. So a couple of things to look back
2 at the rest of the schedule for a second.

3 So back in the September order I believe it
4 is -- I think this is the most -- hold on a second, let
5 me just --

6 MR. JANOVE: Your Honor --

7 THE COURT: All right. Go back -- but I want
8 to say in the September order I had a requirement that by
9 the 18th you were going to put in a letter with regard to
10 class certification, motion practice, and expert
11 discovery. That was tied to some other deadlines. So
12 wondering what you think. Should that be pushed out or
13 are you in a position knowing you're going to wrap up in
14 mid-February? And also, I believe Judge Kovner had an
15 order for you to give her some dates.

16 MS. KRAMER: Your Honor, I think with the case
17 schedule one of the things that we haven't gotten any
18 sort of indication from the plaintiffs on is whether or
19 not they intend to have any experts. And I know that's a
20 question that we've raised in our papers. That would go
21 into figuring out what the remainder of the case schedule
22 might be. I don't know if the plaintiffs have anything
23 to say about that.

24 THE COURT: What is going on? You need to show
25 your cards. What's the deal? What is your thought about

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1 whether you're using experts? I mean well, I can imagine
2 several topics. I don't know if you're going to do it or
3 not but what's the story?

4 MS. KRAMER: Is that a question to the
5 plaintiff?

6 THE COURT: Yes. I'm sitting here with baited
7 breath. Experts or no experts?

8 MR. JANOVE: Your Honor, I think on the expert
9 decision it's probably unlikely but we do want to see the
10 documents that you just ordered production of today, the
11 full financial scope and full financial production that
12 we haven't yet gotten before we make a final decision on
13 that.

14 MS. KRAMER: Your Honor, I just don't see how
15 this remaining handful of nonessential documents is going
16 to make or break the plaintiff's decision on whether or
17 not they're going to have experts because we need to be
18 able to figure out what the plaintiff's case is. And
19 honestly, that's why we're asking for clarification on
20 what's the damages theory. How do you have standing?
21 How do you have damages? What's the harm if you have
22 businesses that nobody ever saw and nothing ever happened
23 with them? You know, what's the case? We've been
24 litigating this for a long time.

25 THE COURT: Right. All right. I mean okay, if

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1 it's not clear to the plaintiffs, I mean I think there's
2 merit to the defendant's request that you clarify the
3 demands. Obviously, that's why I'm having you do the
4 Rule 26 supplementation. But then it becomes I think
5 depending on what area you're pursuing, you know, some
6 case law would require experts especially if you're doing
7 a market analysis which I don't know if you are or you're
8 not. Or you're doing a sampling analysis.

9 So yes, I guess I'm really open to what it is
10 that the defendants are saying in terms of
11 conceptualizing this case. You know, whether you decide
12 the information is useful enough to be fruitful, you
13 know, that's a different question than conceptually what
14 kind of experts are you thinking about? What are they
15 going to testify about? You know, all the sort of
16 initial disclosure that experts would provide at least in
17 part. I'm not even talking about the level of, you know,
18 here's the list of their former testimony or their
19 articles. I'm talking about what areas are you going to
20 use experts in or not because obviously there is a
21 question that defendants keep asking which I think is two
22 parts, right? It's like are you pursuing disgorgement?
23 Are you pursuing a theory of individual harm to
24 reputations? You know, all of this is linked. I think
25 this has been obvious for a while that we're getting

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1 super close to you having to commit to what is the class
2 certification theory, you know, what are you looking for,
3 and also to the judge deciding the standing issue which
4 is overlapping, you know, whether ultimately linked or
5 not. It could be linked or it could just overlap but,
6 you know, have two separate analogies but at least
7 touching on some of the same concerns, right? And I'm
8 stating the super obvious, right? But even over the
9 course of this litigation the Supreme Court has become,
10 and the circuit, has become more focused on what is an
11 actual damage or what kind of harm is compensable
12 especially in statutory claims which is part of your case
13 here.

14 All right. I think this really has to get put
15 to a resolution. So I think the way we had it, the way I
16 put it in was that by January 3rd you're going to
17 supplement the initial disclosures so that defendants
18 have some idea of the damages theory that you're
19 pursuing. So I think that goes hand in hand with the
20 experts.

21 So I think really the way to do this would
22 be -- and this case, question after question piles up if
23 we don't know if you're doing the experts, right?
24 Because if there's no experts and you're not using
25 experts particularly in the class cert motion, you could

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1 move ahead with that. Maybe you're even moving ahead
2 with summary judgment. You know, I'm not sure if you'd
3 like to talk about that with Judge Kovner. And then, you
4 know, if you're using the experts, then it's a real
5 question do you need them for the class certification
6 motion or not? Are they damages experts and you could be
7 making your class cert motion while the expert discovery
8 is happening? You know, there's several permutations all
9 of which we are all sitting here with baited breath.
10 What's the deal?

11 MR. JANOVE: So your Honor, if I could just
12 illustrate why the production of the full set of
13 financials might help inform this decision for one
14 discrete theory of relief is that under the Lanham Act
15 we're going to seek disgorgement of defendant's profits.
16 Right? And by the statutory text, us as plaintiffs have
17 the burden of showing defendant's profit from the
18 unlawful activity. And that could be just as
19 straightforward as, you know, pointing to simple
20 financial statements, simple financial documents, data
21 regarding gift card redemptions on GiftRocket.com or on
22 the Tremendous business line. Or depending on the cost
23 analysis or how convoluted these financial documents may
24 or may not be, it is possible that we might need some
25 additional expert help in carrying that burden to show

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1 profit.

2 So without having seen those documents yet, I
3 can't for sure a whether or not an expert is going to be
4 required for us to carry our burden on the Lanham Act to
5 prove defendant's profits. But I think --

6 THE COURT: All right. I'm not really sure I
7 follow. I don't know. I'm not sure if that's persuasive
8 or not.

9 But look, the document production that you're
10 concerned about is coming basically on the same schedule
11 that your damages analysis needs to be updated and
12 expanded. So I think that to the extent you want to put
13 off committing to whether you're going to have experts --
14 look at the calendar here.

15 Just before I pick the dates, please remind me
16 or point me on this docket where the most recent order
17 from Judge Kovner was because I think you have to give
18 her an update as well. Is that right? She wanted a
19 proposed schedule for something. Am I imagining this? I
20 thought you had a conference with her, that there was an
21 order.

22 MR. JANOVE: Correct. We had a conference
23 where she -- after the conference she overruled the
24 discovery objection and at the conference she said she
25 will be ruling on the other outstanding, the motion to

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1 dismiss which she did --

2 THE COURT: All right. Okay. This is the
3 11/13 order. Right? So the Court will adjudicate
4 standing with respect to the second amended complaint
5 based on the existing filing and the existing R&R because
6 discovery will close, will soon close. Defendants do not
7 intend to file further a motion to dismiss, instead
8 anticipate filing a motion for summary judgment before
9 class certification. The parties will propose a case
10 schedule and joint letter to Judge Scanlon within five
11 days of the close of discovery which is currently
12 scheduled for 12/13.

13 THE COURT: Okay. So is this still the case
14 that the summary judgment motion practice is going to
15 happen before -- you know, we're running through the
16 various permutations and obviously the standing issue is
17 over all of this. But for defendants, are you still
18 pursuing that schedule?

19 MS. KRAMER: Your Honor, the docket in this
20 case is obviously a bit lengthy.

21 THE COURT: The 11/13/24 order from Judge
22 Kovner says that she'll deal with the standing issue
23 based on the current record and that you are going to,
24 defendants, were going to file summary judgment motions
25 before class certification. Is that still the working

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1 plan?

2 MS. KRAMER: Yes, I believe so.

3 THE COURT: Okay. All right. So let's go back
4 to plaintiff. I was going to ask you focusing on the
5 question of expert discovery in connection with damages
6 and class cert to the extent you're envisioning
7 particular experts, are they necessary for the summary
8 judgment motion? What I'm trying to get at is what's the
9 schedule here. Right? You're finishing --

10 MR. JANOVE: Yeah. No, so --

11 THE COURT: -- in February, finishing fact
12 discovery in February. Are you then moving on to the
13 summary judgment motion practice because any expert
14 discovery is about damages? Like what --

15 MR. JANOVE: So we envision after the close of
16 discovery moving for class cert. We can work on the
17 timing when defendants bring their summary judgment
18 motion. I think the summary judgment motions are related
19 to individual liabilities with certain defendants and to
20 the standing of just two of the plaintiffs. But that's
21 not an issue. The summary judgment won't affect the
22 class cert motion. So you know, our proposal would be --

23 THE COURT: I'm sorry, but what was the
24 conversation with Judge Kovner? I mean I don't have the
25 transcript but what it says is that the defendants

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1 instead anticipate filing motions for summary judgment
2 before class certification. And I'm not following how it
3 wouldn't affect class certification because based on your
4 description of the motion -- okay.

5 All right. The baseline is class
6 certification happens first and there's obviously all of
7 the strategic analysis that everybody can go through,
8 whether you know, the summary judgment is going to be
9 dispositive for the class or if it's better to have class
10 certification and then the summary judgment because then
11 the class is bound.

12 Okay. Putting aside those considerations, at
13 least what you just said is the defendants are
14 challenging two of the -- you think they're going to just
15 challenge two of the three class reps. So then you'd be
16 making a class cert soon just for the sake of this. If
17 they're successful, then you are moving with only one
18 class rep which, you know, you can do but that's --

19 Let's switch the focus to defendant for a
20 second. What is it that you are looking for and does
21 anybody recall exactly what the conversation was with the
22 district judge? That would be helpful.

23 MR. JANOVE: Yes, your Honor. This is
24 Katherine Kramer. The conversation with the district
25 judge was about how to make this efficient because we

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1 were still at the point of potentially filing motions to
2 dismiss for some of the parties. And we said that
3 doesn't really make sense to do that because then we
4 would just be challenging the pleadings and at this point
5 we basically know all the facts because we're pretty
6 close to the end of discovery. So we agreed that instead
7 of filing a motion to dismiss we would be able to do a
8 partial summary judgment motion --

9 THE COURT: Okay.

10 MS. KRAMER: -- and we'd be able to do that
11 without the pre-motion conference process and essentially
12 cover that in the conference that we had with her. So
13 that's what we had in mind.

14 And essentially some of the arguments that we
15 would have otherwise made about, you know, standing and
16 issues like that that have been raised in the motions to
17 dismiss that have been filed already on behalf of some of
18 the defendants, I expect that we would raise those. I
19 think it's entirely possible that we'll have summary
20 judgment motions across the board, but we'll see. The
21 idea was that we would be able to do partial summary
22 judgment motions and we'll figure that out without being
23 bound to a limited number of that.

24 But I think that the idea was that we would
25 then file the summary judgment motion before class

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1 certification because I think that it would, the ruling
2 on the summary judgment would have a huge impact. You
3 know, potentially the whole case would be gone if the
4 summary judgment across the board is granted and then
5 there is no class to certify because there's no case.

6 THE COURT: Okay. Just so I'm clear, is the
7 summary judgment motion practice that you discussed with
8 Judge Kovner, is that only the partial summary judgment
9 which is essentially a proxy for the motion to dismiss?
10 All you're talking also about what I'll call the global
11 summary judgment motion?

12 MS. KRAMER: Well, we wanted to just leave our
13 options open for that.

14 THE COURT: Okay.

15 MS. KRAMER: So it's not limited to partial
16 summary judgment, but partial summary judgment is
17 possible.

18 THE COURT: Right. On the defendant's side, I
19 guess -- you can't really answer the question because it
20 goes back to the plaintiff. You need to know what your
21 story is with regard to experts and are those experts
22 relevant to -- would they know what they're testifying
23 about or proposed to testify about? Then defendants
24 could make a decision about partial summary judgment,
25 complete summary judgment, when it should happen, and

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1 everybody would understand the theory of the class
2 certification with much greater clarity.

3 So all right, I think to move this forward we
4 have the dates for the production I think. Plaintiffs,
5 you need to commit. Are you having experts and if so,
6 what are they testifying about? So you're going to have
7 that information by January 3rd. You can look through
8 it. I think by January 24th the plaintiff -- and I'm
9 assuming just the way this case has gone that if
10 plaintiffs are having the initial moving experts, if
11 you're having experts at all, that you need to do at
12 least the initial disclosure which is who the experts are
13 and what it is they're going to testify about. And then
14 I think we could revert to something closer to the
15 schedule that we had before which is you all can propose
16 the expert schedule and then I think you also need to
17 know the expert discovery schedule and then the motion
18 practice schedule.

19 And I think on the defendant's side, one
20 question here is are you making an early -- basically
21 filling out what you were saying to the district judge,
22 and early, early-ish partial summary judgment motion once
23 the fact discovery is done? Are you waiting for expert
24 discovery? This is becoming a complete bottleneck here
25 not knowing what's happening and trying to figure out

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1 where to go.

2 All right. You have the interim dates. You
3 have February 14th is really the absolute close of fact
4 discovery. So unless something completely unexpected
5 happens, you should expect that that's the close of fact
6 discovery.

7 And then by January 24th, the plaintiffs will
8 receive from -- I'm sorry. Plaintiffs will give the
9 information that I just said about the experts and the
10 topic and what's the names of the experts. And I'm just
11 trying to sync this up with what Judge Kovner was asking
12 for.

13 And then I think once we know that, let's say
14 by February 7th there's a joint letter with the schedule,
15 expert discovery, dispositive motion practice, class cert
16 motion practice, and that should probably go to both
17 judges.

18 And then since I don't know everything that you
19 covered, I don't know what was exempted from a pre-motion
20 conference letter or what would need a letter, so you're
21 going to have to fill in those details.

22 All right. I think that's a working schedule
23 here. I have the information that you gave me. We'll
24 enter an order on the issues that are in the status
25 letter. If you have issues that come up along the way,

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1 preferably you'll let me know by a joint letter, but you
2 know, let me know as quickly as you can so that we can
3 deal with it so it can be resolved within the discovery
4 time period.

5 All right. I'm going to raise one other thing
6 before I let you go. Any reigniting of settlement
7 discussions? You know, we kept getting tempting
8 suggestions which I am absolutely not picking up to know
9 what happened with Giftly and how you all could get
10 there. Any thoughts now that you've done the discovery
11 or will be moving towards finishing it that you want to
12 have more settlement discussions? You think mediation
13 would be helpful? If yes, any interest in private
14 mediation or court mediation? As always, there's
15 deafening silence. So let's start with --

16 MR. JANOVE: Uh --

17 THE COURT: -- defendants on this one. I heard
18 plaintiff's counsel. Go ahead. Plaintiff's counsel,
19 your thoughts about that?

20 MR. JANOVE: Oh, yeah. I mean we made a demand
21 a few weeks ago and haven't heard back. So we're
22 assuming that settlement discussions aren't going to make
23 any progress, aren't making progress at this moment.

24 MS. O'NEILL: Hi, your Honor. This is Megan
25 O'Neill for the GiftRocket defendants. You know, I think

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1 that the door is always open. I think this isn't
2 probably the best time in terms of we're teeing up a lot
3 of motion practice at this stage of the case. But like I
4 said, the door is always open so it's not closed. I
5 think though that the experience with the cancelled
6 mediation has soured that quite a bit. So meaning I
7 would absolutely want to go to mediation but for what had
8 happened last time.

9 So I'm not sure that our clients are -- they
10 certainly have not closed the door to settlement but I
11 don't think there's a reason to order mediation at this
12 point given the history.

13 THE COURT: I'm not going to order it. I mean
14 this is obviously a two to tango, but to the point that
15 was made earlier, you know why summary judgment instead
16 of a motion to dismiss because you already know
17 everything, or almost everything there is to know. So it
18 seems like everybody would be in a stronger position to
19 evaluate the possibility of your definition of success,
20 succeeding, or you know, loss and what the exposure is
21 and whether there's an interest in protecting against
22 that early in the day. So whatever metaphor you want to
23 use for talking about how to come to a resolution short
24 of dispositive motion practice and trial.

25 Like I'm sure this has been an expensive case.

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1 The experts are probably not going to make the amount of
2 money (indiscernible) but you are moving to the motion
3 practice in the next couple of months and you have the
4 information you need. So it might make sense to have the
5 conversation. It's up to you all what you want to do.

6 MS. O'NEILL: All very good points, your Honor.
7 I think once we have the plaintiff's theory of the case
8 articulated a little more clearly, that might be a good
9 time to think about doing that again. I think we're
10 still lacking some information. So once we have that,
11 you know, maybe that'll be a better time. So like I
12 said, the door is not in any way closed. You know, we
13 just are not in the same ballpark at the present moment.

14 THE COURT: Okay. On that point, just to go
15 back to plaintiff, you know, you had in your letters
16 expressed reluctance about committing to a damages theory
17 and suggesting you need more information, whatever.
18 Obviously, you haven't made a decision in that regard.
19 But you could satisfy the order or you could be even more
20 complete and really showing your hand on the analysis
21 maybe short of the need for the experts so that you could
22 get this conversation going because I think the
23 fundamental point on the defendant's side is what is
24 their realistic exposure? Obviously they say none but to
25 the extent you have helpful analysis, it would be a good

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1 idea to start sharing it because it is going to come out
2 anyway. Okay.

3 MR. JANOVE: Your Honor, we didn't include that
4 type of analysis in the demand we made a few weeks ago
5 that we're not hearing back from, but your point is well
6 taken and we can certainly make it more clear to the
7 GiftRocket defendants.

8 THE COURT: Okay. All right. That's all we
9 have here. So thanks very much and have a good week.
10 Take care. Bye.

11 MS. O'NEILL: Thank you, your Honor.

12 MS. KRAMER: Thank you so much.

13 MR. JANOVE: Thank you, your Honor.

14 (Matter concluded)

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C E R T I F I C A T E

I, MARY GRECO, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 6th day of December, 2024.


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